# STATE OF MICHIGAN

# COURT OF APPEALS

REPUBLIC BANK,

Plaintiff/Counterdefendant-Appellee,

v

BRITTON ESTATES, L.L.C., GREGORY MICHAEL FRAUNHOFFER, SR., individually and as Trustee of the GREGORY MICHAEL FRAUNHOFFER SR. TRUST NO. 1, and COUNTRY HERITAGE, L.L.C.,

Defendants/Counterplaintiffs-Appellants,

and

DEANGELIS LANDSCAPE, INC., d/b/a DEANGELIS CONTRACTING, INC., BOSS ENGINEERING COMPANY, SINACOLA COMPANIES, INC., SINACOLA EQUITY VENTURES, INC., DOAN CONSTRUCTION COMPANY, LINEAR CONSTRUCTION & DEVELOPMENT, CONSTRUCTION MANAGEMENT SPECIALISTS, INC., AL'S ASPHALT PAVING COMPANY, DANIEL CAREY, PIONEER LOGISTICS CORPORATION, d/b/a BETTERWAY MOBILE, MUNICIPAL & INDEPENDENT STORAGE, and B & V CONSTRUCTION, INC.,

Defendants,

and

MICHAEL D. KENNEDY,

Intervening Plaintiff.

UNPUBLISHED
February 23, 2006

No. 258616
Lenawee Circuit Court
LC No. 04-001464-CH

Before: Hoekstra, PJ, and Neff and Owens, JJ.

PER CURIAM.

Defendants-appellants appeal as of right from the trial court's judgment of foreclosure and deficiency in favor of plaintiff. We affirm.

This case arises from a commercial loan agreement for the maximum principal sum of $5,050,000, which was entered into on August 23, 2001, by plaintiff, a bank lender, and appellant Britton Estates, L.L.C. (Britton Estates). The loan was secured by real property and a mobile home park to be constructed thereon in two phases. Appellants, Gregory Michael Fraunhoffer, Sr., and the Gregory Michael Fraunhoffer Trust No. 1, were guarantors of the loan under the original loan agreement. Appellant Country Heritage, L.L.C., became a guarantor pursuant to a written amendment to the loan agreement.

In February 2004, plaintiff commenced this action to foreclose on the real property and seek other relief against appellants based on Britton Estates's alleged default with respect to the loan agreement and the other appellants' alleged default with respect to their guarantees. In July 2004, appellants filed a countercomplaint against plaintiff, seeking damages for plaintiff's alleged breach of the loan agreement, and fraudulent and innocent misrepresentations. Appellants also sought specific performance of plaintiff's alleged promises by requiring it to fund completion of the construction project. The trial court granted plaintiff's motion for summary disposition with respect to its claims against appellants and appellants' countercomplaint, and entered a judgment of foreclosure and deficiency in favor of plaintiff.

Appellants, relying on MCR 2.613(A), argue that reversal is required because the trial court failed to specify either the particular subrule or subrules of MCR 2.116(C), or the applicable standards, on which it relied to grant summary disposition. We conclude that appellants have not established that refusal to reverse the trial court's decision would be inconsistent with substantial justice. MCR 2.613(A).

"Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule." MCR 2.517(4). The summary disposition rule, MCR 2.116, does not require specific findings or conclusions of law. Indeed, findings of fact are not permitted when a motion is made under MCR 2.116(C). *Nesbitt v American Community Mut Ins Co,* 236 Mich App 215, 225; 600 NW2d 427 (1999). Here, the trial court did not make findings of fact. The court adequately explained its decision to grant plaintiff's motion by referring to the materials that it reviewed, and by relying on written loan documents and the statute of frauds to conclude that appellants were precluded from pursuing a claim based on oral agreements.

We review a trial court's decision on a motion for summary disposition de novo. *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 369; 666 NW2d 251 (2003). It is well settled that a reviewing court may review a trial court's decision under the applicable subrule of MCR 2.116(C). See *Spiek v Dep't of Transportation,* 456 Mich 331, 338; 572 NW2d 201 (1998). Even a party's mislabeling of a motion under the wrong subrule will not preclude appellate review under the correct subrule as long as neither party was misled by the mislabeling of the motion. See *Mollett v Taylor,* 197 Mich App 328, 332; 494 NW2d 832 (1992).

Plaintiff's motion indicated that it was based on MCR 2.116(C)(8) and (10), but it is clear that plaintiff was relying on evidence beyond the pleadings when seeking summary disposition with respect to the parties' contract dispute. Plaintiff submitted documentary evidence and affidavits in support of its position that it did not breach the loan agreement by refusing to grant the loan advance requested in June 2003, that Britton Estates defaulted on the loan agreement, and that the other appellants defaulted on their guaranty agreements. Further, while plaintiff challenged the specificity of the fraud allegations in appellants' countercomplaint, it is clear that plaintiff also relied on the statute of frauds as precluding any claims based on alleged oral promises. Similarly, appellants did not rely solely on the pleadings to oppose plaintiff's motion, but also submitted affidavits in support of their position that the motion should be denied.

A motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Where the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.* Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by the statute of frauds. Unlike a motion under MCR 2.116(C)(10), neither party is required to file supportive materials with respect to a motion under MCR 2.116(C)(7). *Id.* at 119. But if evidence is submitted to the trial court, it must be considered. *Id.*; MCR 2.116(G)(5). The allegations in the complaint are accepted as true unless contradicted by the evidence. *Id.* at 119.[1]

Appellants assert that MCR 2.116(C)(10) could not apply because discovery was not undertaken. A motion under MCR 2.116(C)(10) can be raised at any time. MCR 2.116(D)(3). "If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994), citing *Michigan Nat'l Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241; 497 NW2d 1993. Summary disposition may be granted if there is no reasonable chance of uncovering factual support for the opposing party's position from further discovery. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003).

Appellants did not show any reasonable chance for uncovering factual support for their position. They offered no evidence to rebut plaintiff's evidence of multiple default events under the loan agreement, including Britton Estates's failure to pay interest after July 2003, or to complete phase I of the project by December 31, 2003. Regardless whether plaintiff approved changes in the development, appellants offered no evidence that plaintiff agreed to modify or waive its right to use the appraised value for phase I under ¶ 1.1(A) of the August 23, 2001 loan agreement to determine its maximum loan commitment for the phase I note. Appellants'

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[1] In this case, MCR 2.116(C)(7) is applicable to the extent that plaintiff relied on the statute of frauds as precluding appellants' counterclaims, but is not dispositive of whether plaintiff was entitled to a judgment of foreclosure and deficiency. Rather, MCR 2.116(C)(10) is the appropriate subrule to apply in determining whether plaintiff was entitled to the judgment under the terms of its loan agreement with Britton Estates and the guarantor agreements. Under either subrule, we must consider whether the submitted evidence established that there was no genuine issue of material fact for trial.

reliance on the waiver provision in ¶ 2.6 of the loan agreement is misplaced because it expressly applies only to the conditions in ¶¶ 2.3 through 2.5, and states that a waiver of any of those conditions "shall not release Borrower from any other provision of this Agreement." Paragraph 2.6 is consistent with the anti-waiver provision in ¶ 7.7, which provides:

> The failure of the Bank at any time to require performance of Borrower under any provision of this Agreement, the Note, or the Security Documents shall not be deemed a continuing waiver of that provision or a waiver of any other provision of such documents, and shall in no way affect the full right to require full performance from Borrower at anytime thereafter.

We also reject appellants' claim that the failure to expressly require a written waiver creates ambiguity with respect to whether the loan agreement could be modified orally. Generally, a contract is patently ambiguous if it is susceptible to two reasonable interpretations. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Two provisions of a contract that irreconcilably conflict create ambiguity. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 480; 663 NW2d 447 (2003). Here, however, modification of the loan agreement was governed by ¶ 7.3, which unambiguously states that it contains the parties' entire agreement and provides that it "may not be altered or modified except by a writing signed by the party against whom such alteration or modification is sought." A waiver of a contract right and the modification of a contract term are not synonymous, although both require proof of mutual assent. *Quality Products & Concepts Co, supra* at 372-374. Hence, the failure to specify a writing requirement for the waiver does not create ambiguity.

In any event, the statute of frauds, MCL 566.132(2)(b) and (c), requires a writing to modify or waive a loan provision. The statute "plainly states that a party is precluded from bringing a claim—no matter its label—against a financial institution to enforce the terms of an oral promise to waive a loan provision." *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 549-550; 619 NW2d 66 (2000). Although a signed note or memorandum may have been sufficient to satisfy the statute of frauds, evidence that the parties mutually assented to the agreement was still required. *Kelly-Stehney & Assoc, Inc v MacDonald's Industrial Products, Inc (On Remand)*, 265 Mich App 105, 113, 117; 693 NW2d 394 (2005).

Here, even if we assume further discovery could provide factual support for appellants' position that plaintiff, in writing, effectuated a transfer of $460,000 of Fraunhoffer's funds to a title company to extinguish contractors' liens in connection with the closed water and sewer system, there was no evidence that the writing was executed as part of a mutually assented agreement to waive the maximum loan commitment standard in ¶ 1.1(A) of the loan agreement. Indeed, Britton Estates, as the borrower, had a continuing obligation under the loan agreement to pay contractor liens. Paragraph 4.5 of the agreement provided that "[w]ithin thirty (30) days of the filing of any lien or claim against the Mortgaged Premises, Borrower will pay the lien or obtain a bond sufficient to discharge the lien or will otherwise cause the lien to be discharged." The evidence, viewed most favorably to appellants, did not establish a genuine issue of material fact with respect to appellants' contention that plaintiff had a contractual duty to pay the June 2003 request for a loan advance, nor did appellants demonstrate that discovery stood a reasonable chance of yielding support for their position.

Appellants have also failed to adequately brief the trial court's grant of summary disposition with regard to their counterclaims for fraud and innocent misrepresentation. We note in passing that the record reflects that appellants' claims were based on alleged promises, rather than misrepresentation of existing facts. In general, promises cannot form a basis for a fraud or misrepresentation claim. See *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976) (fraud), and *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998) (innocent misrepresentation). Even if promises were actionable, the claims would be precluded by the statute of frauds, the applicability of which is not dependent on the label attached to appellants' cause of action. *Crown Technology Park, supra.* Hence, pursuant to MCR 2.116(C)(7), the trial court reached the correct result in granting plaintiff's motion for summary disposition because the statute of frauds barred appellants' misrepresentation claims. MCR 2.116(I)(5) does not apply when MCR 2.116(C)(7) is the appropriate basis for summary disposition. In any event, a trial court need not provide a party with an opportunity to amend a pleading when, as here, the amendment would be futile. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 695-696; 588 NW2d 715 (1998).[2]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Donald S. Owens

[2] We decline to consider appellants' claim that equitable estoppel could preclude enforcement of the statute of frauds because this issue was not presented to the trial court in response to plaintiff's motion for summary disposition. *FMB-First Nat'l Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998). Further, appellants have not adequately briefed their claim to properly invoke appellate consideration. *Peterson Novelties, Inc, supra* at 14.